STATE OF MICHIGAN

COURT OF APPEALS

ROBERT BETTIS,

Plaintiff-Appellee,

v

RALPH KINSLEY, II, a/k/a EDWARD R. KINSLEY, II, THE BENJAMIN COMPANY, BENJAMIN FURNITURE COMPANY, d/b/a LEXINGTON FURNITURE,

Defendants-Appellants.

UNPUBLISHED
July 20, 2004

No. 246567
Sanilac Circuit Court
LC No. 01-027700-CK

Before: Zahra, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment, following a bench trial, awarding plaintiff $56,400, plus costs, for defendants' breach of fiduciary obligations.[1] We affirm.

This case arises from a joint furniture-selling venture between plaintiff and defendant,[2] according to which defendant supplied space and capital, and plaintiff provided management, relationships with wholesalers, and "sweat equity." After a few years of operation, tensions arose over suppliers' being left unpaid, and finally, when defendant disagreed with plaintiff's decision to lend some furniture to a school play, defendant dismissed plaintiff from the business and maintained that he was entitled to nothing further from it.

On appeal, defendant argues that the trial court erred in allowing plaintiff to amend his complaint to allege that a partnership existed, and also in piercing the corporate veil and thus

[1] Defendant Benjamin Furniture Company was apparently in bankruptcy at some time during these proceedings, but counsel has assured this Court that the automatic-stay provision of the federal bankruptcy code, 11 USC 362(a)(1), was lifted in this case.

[2] For convenience, references to the singular "defendant" in this opinion refer to defendant Kinsley personally.

holding defendant personally liable along with the defendant corporations.[3]

I. Amended Complaint

A trial court's decision whether to allow amendment of the pleadings is reviewed for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). However, interpretation of the pleadings alone presents a question of law. See *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

"In determining whether a partnership exists, the focus is not on whether individuals subjectively intended to form a partnership . . . . Instead, the focus is on whether individuals intend to jointly carry on a business for profit within the meaning of the Michigan Uniform Partnership Act . . . ." *Byker v Mannes*, 465 Mich 637, 638-639; 641 NW2d 210 (2002), citing MCL 449.1 *et seq.* "A partnership is an association of 2 or more persons . . . to carry on as co-owners a business for profit . . . ." MCL 449.6(1). Receipt of a share of profits is evidence that a partnership exists, unless the payments were received as payment of wages, installments on a debt, interest on a loan, or consideration for purchase of good will of a business or other property. MCL 449.7(4). "The gist of the partnership relation is mutual agency and joint liability." *Lobato v Pauling*, 304 Mich 668, 675; 8 NW2d 873 (1943).

Plaintiff's original complaint named defendant personally, doing business as Lexington Furniture or The Benjamin Company, as the only defendant. Nearly a year later, plaintiff's attorney explained to the trial court that he had learned that The Benjamin Company was an existing corporation, and that The Lexington Furniture Company had also been incorporated. Plaintiff's attorney sought to amend the complaint to add the latter two corporations as defendants, and insisted that he was not seeking to add new theories of recovery. The court allowed the amendment as requested.

The resulting amended complaint not only added the corporate defendants, however, but recast the third paragraph to state, explicitly for the first time, that the parties "agreed to a partnership and joint venture." Defendant moved to strike parts of the amended complaint, including the allegation of a partnership, on the ground that they exceeded the scope of amendment as allowed by the court. The court ruled that the original complaint presented a

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[3] Although defendant devotes many words to arguing that the trial court erred in concluding that a partnership existed in fact, defendant did not include such a challenge within his statement of the question presented. Accordingly, we consider such argument only insofar as it bears on the question whether defendant acted in ways that invited a piercing of the corporate veil. See MCR 7.212(C)(5); *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995) (an issue that is not raised within the statement of questions in the brief on appeal is not properly presented for purposes of appellate review). In any event, plaintiff's testimony so clearly indicated that a partnership existed that we have little inclination to question the trial court's judgment in the matter. "An appellate court recognizes . . . the judge's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony." *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996).

partnership theory well enough that doing so more precisely in the amended complaint did not violate the court's order restricting the amendment to adding parties, not new theories. We agree with the trial court.

The original complaint does not mention the word "partnership," but does assert that the parties "agreed to establish a business," that "the parties purchased and sold furniture, established credit and divided profits pursuant to their agreement," and that "money that was given to [defendant] during the course of their confidential relationship was misappropriated by [defendant], and he has refused to account for the monies." Citing these provisions, the trial court concluded that "they do allege that the parties entered into an agreement to establish a business and divide the profits," and thus that those paragraphs effectively alleged the creation of a partnership.

Although the existence of a partnership was not asserted explicitly, it was strongly implied by the allegations, in the paragraphs cited by the trial court, that the parties had a "confidential relationship" through which they agreed to establish a business and share profits, and the suggestion that one party could "misappropriate" money from the enterprise and violate some duty to account for it. Moreover, in addition to the provisions cited, plaintiff described how the fortunes of both parties improved as the "equity" in the business increased, and asserted that in time defendant "began to remove cash from the operation without notifying [plaintiff], and diverted the money to other non-business purposes without the permission of [plaintiff]." The assertion that the parties shared in the benefits of increasing equity suggests a co-ownership arrangement, not one of master and servant. And the complaint that defendant "diverted" profits to "non-business purposes" necessarily underscores that plaintiff was alleging the existence of a fiduciary relationship between the parties that well comports with principles of partnership, but poorly with those of other business relationships.

Because several particulars of plaintiff's original complaint spelled out a clear intent among the parties to carry on, as co-owners, a business for profit, *Byker, supra*, the court did not err in holding that introduction of the word "partnership" into the amended complaint was not introduction of a new theory of recovery.

II. The Corporate Veil

The decision whether to pierce the corporate veil, or, in other words, hold a corporation's owners personally responsible for the corporation's liabilities, is equitable in nature. See *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996). When reviewing an equitable determination reached by the trial court, this Court reviews the conclusion de novo, but reviews the supporting findings of fact for clear error. *Michigan Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992).

In challenging the trial court's decision to treat the individual and corporate defendants as one in this case, defendant does not set forth the criteria involved in imposing that remedy, let alone directly attack the decision below in relation to any of them, but instead offers only general argument.

A court may pierce the corporate veil where the corporation was merely the instrumentality of another entity or individual, the corporate structure was used to perpetuate a

fraud or other wrong, and the plaintiff suffered unjust loss or other injury in the matter. *Foodland Distributors*, *supra* at 457. These elements must be considered case by case, in light of the totality of the circumstances. *Id.*

In this case, the trial court stated as follows:

> It is clear from the testimony that Mr. Kinsley individually diverted money into his other businesses, paid for personal trips to Florida, for personal telephone bills, and made payments upon a personal vehicle and boat, all of which may or may not have been from his 60% entitlement of profits. This evidence certainly shows an intermingling of corporate assets with personal assets.
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> While this lawsuit was pending, Mr. Kinsley dissolved the Benjamin Company and transferred the assets to a previously dormant corporation known as the Benjamin Furniture Company without any money changing hands, without notifying any creditors, without having a corporate meeting or maintaining any corporate records or minutes. It is the finding of this Court that the corporations which are Defendants in this action were merely the alter ego of Ralph Kinsley, II, and sham corporations. Therefore, it is the finding of this Court that Ralph Kinsley, II, shall be personally liable jointly and severally with the other Defendants for any damages in this action.

Concerning whether the defendant corporations were mere instrumentalities of defendant personally, defendant conceded that he himself was the only shareholder of the defendant corporations, and the evidence includes that defendant consistently commingled corporate and personal funds, and that he recast The Benjamin Company as The Benjamin Furniture Company with virtually none of the formalities that would be in order if discrete corporate identities were involved. This afforded the trial court a reasonable basis for concluding that the corporate defendants were "merely the alter ego" of defendant Kinsley.

Concerning whether the corporate structure was used to perpetuate a fraud or other wrong, plaintiff testified that defendant acknowledged owing money to the business' suppliers, but wilfully refusing to pay, preferring to divert corporate funds to his own use. Further, defendant's failure to separate corporate and personal funds and expenses obscured plaintiff's ability to seek redress of that problem.

Concerning whether plaintiff suffered unjust loss or other injury in the matter, defendant's posture in dismissing plaintiff from the business exposed plaintiff to a loss of good will among the furniture suppliers he had worked with, and impeded plaintiff's ability to draw earnings to which he was entitled from that enterprise.

For these reasons, we conclude that the trial court did not err in concluding that the criteria for piercing the corporate veil were met.

Defendant makes much ado over plaintiff's having signed two statements referring to independent contractor status, but plaintiff explained that he understood that those documents constituted a formal posture mainly for purposes of apportioning responsibility for worker's compensation and tax withholding. Whether that posture was an entirely honest one for those

purposes is not here at issue, but it should be apparent that the formal structuring of business interests for purposes of tax liabilities does not itself trump whatever the actual relations may be for purposes of identifying the existence of, or obligations under, a partnership arrangement.

Defendant cites release language from one of the statements of independent contractor, and argues that this should have constituted a complete liability shield. However, the language in question simply announces that the undersigned serves as independent contractor to The Benjamin Company, doing business as Lexington Furniture Co., and agrees to hold the latter "HARMLESS FROM ALL LIABILITY ARISING FROM THE PERFORMANCE OF SAID SERVICES," adding, "THIS SAME RELEASE OF LIABILITY SHALL EXTEND TO ALL OFFICERS, EMPLOYEES, HEIRS, EXECUTORS, AND ASSIGNS OF SAID CORPORATION." This language clearly seeks to shield defendants Kinsley and The Benjamin Company from liabilities arising from plaintiff's conduct only; it does not otherwise extinguish plaintiff's interests or expectations, or defendant's obligations to plaintiff, pursuant to the partnership.

Defendant otherwise simply urges different interpretations of the evidence on this Court, without isolating anything in particular as a clear factual error on the trial court's part upon which it must have relied in finding defendant personally liable in this matter.

For these reasons, we uphold the trial court's decision to pierce the corporate veil.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder